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# In the Supreme Court of the United States

KEVIN AND JULIA ANDERSON, DALE AND BETHANY DANIELS, LIONEL AND JILL GUAY III, STEPHEN AND SHARON JEROME, CHRISTINE KOZA, LAWRENCE AND KATHRYN RUGAN, MICHAEL AND JENNIFER VAN DER WERF, MICHAEL AND JERILYN WARD,
*Petitioners*,

v.

DURHAM SCHOOL DEPARTMENT, SUPERINTENDENT SHANNON WELSH, MINOT SCHOOL DEPARTMENT, SUPERINTENDENT ROBERT WALL, RAYMOND SCHOOL DEPARTMENT, SUPERINTENDENT SANDRA CALDWELL, MAINE DEPARTMENT OF EDUCATION, COMMISSIONER SUSAN GENDRON,
*Respondents*.

On Petition for Writ of Certiorari to the Maine Supreme Judicial Court

## BRIEF OF TEXAS AND ALABAMA AS AMICI CURIAE ON BEHALF OF PETITIONERS

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## QUESTIONS PRESENTED

1. *Weinberger v. Wiesenfelder*, 420 U.S. 636 (1975), teaches that when the government's true reason for treating citizens unequally is known, courts should not accept post hoc justifications that were not the goal of the challenged legislation. In light of *Weinberger*, may the state of Maine justify the unequal treatment of religion in a high school education program on grounds that plainly were not an actual goal of legislators who enacted the program?[1]

2. Until 1980, Maine had a long history of including religious options in its high school "tuitioning" program and there is nothing in the state constitution that even arguably requires the exclusion of religious options from that program. Does this Court's decision in *Locke v. Davey*, 540 U.S. 712 (2004), permit Maine to exclude religious options entirely from an otherwise neutral educational aid program based solely on a misinterpretation of the Federal Establishment Clause?

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1 Although the *amici* States support both questions Petitioners present, this brief does not address the first question. Rather, it presents an additional, distinct conflict in the lower courts as to the treatment of categorical exclusions of religious schools.

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## INTEREST OF *AMICI*

The *amici* States appear as *amici curiae* in support of Petitioners, Kevin and Julia Anderson, *et al.* SUP. CT. R. 37.4.

The *amici* States have a significant interest in this case because of the important religious liberties at stake, most prominently the right of their citizens under the Federal Constitution to be free from governmental discrimination based on religious belief or association. The *amici* States also have a strong interest in a clarification of the law governing their funding programs, in ensuring that each State's citizens are protected from invidious discrimination based on religious beliefs, and in promoting a pluralistic society.

## SUMMARY OF ARGUMENT

Maine's tuitioning statute discriminates on the basis of religion. It provides a generally applicable benefit to students in districts without public high schools by paying tuition to the private high school of the parents' choice—so long as that school is not religious.[2] That discrimination is wrong, and it is unconstitutional under the principle that government must be neutral toward religion. The Court's decision in *Locke v. Davey*, 540 U.S. 712 (2004), did not grant States an open invitation to exclude religion from all generally applicable government benefits, and the Maine Supreme Judicial Court's forgiving treatment of categorical exclusions of religion from such benefits conflicts with the approach of both the Eighth and Sixth Circuits.

The decision below creates substantial confusion as to the extent to which the Constitution protects religious believers and institutions from discrimination. Under the Maine court's approach, categorical exclusions of religion are subject only to rational basis review, rather than strict scrutiny as under the Eighth and Sixth Circuits'. And, even more importantly, the Maine court's approach is fundamentally contrary to decades of this Court's decisions protecting religious liberty.

Regardless of how this case is analyzed, the Maine program violates the constitutional neutrality principle. And that principle flows, not from just one line of cases or another or one particular clause or another, but

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2 Maine's program covers both elementary and secondary education, but only high school education is at issue here.

from the Free Exercise Clause *and* the Establishment Clause *and* the Free Speech Clause *and* the Equal Protection Clause. All four clauses converge to yield a single principle, and that principle controls this case: In administering a generally applicable program, government must maintain neutrality toward religion. It cannot discriminate in favor of religion, or in favor of one religion over another, and—critically—it cannot discriminate against religion.

## ARGUMENT

### I. *ANDERSON V. TOWN OF DURHAM*'S CONSTITUTIONAL BLESSING ON A CATEGORICAL EXCLUSION OF RELIGIOUS SCHOOLS FROM A PUBLIC FUNDING PROGRAM CONFLICTS WITH THE APPROACH OF BOTH THE EIGHTH AND SIXTH CIRCUITS.

The opinion below holds that the Free Exercise Clause and the Equal Protection Clause allow the categorical exclusion of religious high schools from a generally available, otherwise neutral state-sponsored tuition program. *See Anderson v. Town of Durham,* 895 A.2d 944 (Me. 2006). Parents in Maine's school districts without a public high school may receive free education at any private school of their choice, so long as that school is not religious. *See* 20-A M.R.S. §2951(2) (2005) ("A private school may be approved for the receipt of public funds for tuition purposes only if it: . . . (2) . . . [i]s a nonsectarian school in accordance with the First Amendment of the United States Constitution."). The Maine Supreme Judicial Court held that excluding religious schools *qua* religious schools did not violate the First or Fourteenth Amendments on the ground that even if providing aid would be permissible under the Establishment Clause, the Free Exercise and Equal Protection Clauses did not require it. 895 A.2d, at 961.

#### A. *Locke v. Davey* Does Not Control.

The Maine Supreme Judicial Court relied heavily on *Locke v. Davey,* 540 U.S. 712 (2004), in which this Court declined to find "presumptively unconstitutional" Washington's otherwise-neutral college scholarship program that excluded devotional theology majors. *Id.*, at 720. *Locke*'s reasoning is narrow and should not be extended beyond its facts. Indeed, the Chief Justice's opinion for the Court deliberately eschewed speaking any more broadly than to the specific circumstance of the ecclesiastical

training of clergy. Thus, the 7-2 majority in *Locke* did not articulate any precise standard for evaluating the defunded scholarship recipient's free-exercise claim. Instead, it described what the program did not do: It found that refusing to fund the training of ministers did not impose sanctions on a religious rite, did not deprive ministers of the opportunity to participate in political affairs, and did not require religious adherents to choose between a belief and a government benefit. *Id.*, at 720-21. These factors cited by the *Locke* majority were not an exclusive list of burdens necessary to win a free-exercise challenge. Rather, they bolstered the creation of a special exception for ministerial training. *Id.*, at 721 ("Indeed, majoring in devotional theology is akin to a religious calling as well as an academic pursuit."). Ministerial training has "no counterpart with respect to other callings or professions." *Id.* Thus, the *Locke* Court's finding that treating ministerial training differently was "not evidence of hostility toward religion," *id.*, did not command the Maine Court's conclusion that "a statute does not lose its neutrality and become subject to strict scrutiny simply because it precludes state funding of a religious educational choice." *Anderson*, 895 F.2d, at 959.

Moreover, the *Locke* Court found significant that Washington's scholarship program went "a long way toward including religion in its benefits." *Id.*, at 724. Students receiving the scholarships could "attend pervasively religious schools, so long as they are accredited." *Id.* These students could also take devotional theology courses. *See id.*, at 725. The exclusion of devotional theology majors, therefore, was narrowly tailored to avoid funding sectarian clergy.

Most significantly, the Court found no "animus toward religion. Given the historic and substantial state interest at issue, we therefore cannot conclude that the denial of funding for vocational religious instruction *alone* is inherently constitutionally suspect." *Id.* (emphasis added). The lack of animus combined with Washington's long history of refusing to fund clergy were both critical to the Court's conclusion that Washington's Promise Scholarship was constitutional.

By contrast, Maine's section 2951(2) excludes *all* sectarian schools. *Locke's* finding that declining to fund the ecclesiastical training of ministers is constitutionally permissible does not absolve Maine of its constitutional duty to include religious schools in a much broader and

otherwise neutral funding program. The Eighth and Sixth Circuits have found that such categorical exclusions are evidence of hostility toward religion and, as such, warrant strict scrutiny. *See infra*, I.B. The Maine Supreme Judicial Court also assumed pre-*Locke* that strict scrutiny would apply to the exclusion, but then wrongfully read the Court's decision in *Locke* so broadly as to alleviate all free-exercise concerns in educational funding, thus yielding a rational basis analysis. *See Anderson*, 895 A.2d, at 959.

Additionally, Maine, unlike Washington, has no history of refusing to fund religious education, either in public or private schools. Maine has no State constitutional provision equivalent to Washington's, which required public schools to be "free from sectarian control." WASH. CONST. art. IX, §4. To the contrary, Maine's private school tuitioning system for districts without a public school has existed for over 200 years and included religious secondary schools for over a century, from 1879 until 1980 when Maine's attorney general opined that the use of state tuition funds at religious schools violated the Establishment Clause. AVA HARRIET CHADBOURNE, HISTORY OF EDUCATION IN MAINE 281-84 (1936); *see also Anderson*, 895 A.2d, at 948 (citing Op. Me. Att'y Gen. 80-2). Maine's history gives it no basis to apply *Locke*'s ministerial-training exception to its tuition funding.

Finally, the financial burden is substantially higher on would-be tuition recipients than in *Locke*.[3] The *Locke* Court found that Davey suffered only a "relatively minor burden" through the loss of his scholarship. *Locke*, 540 U.S., at 725. Davey's scholarship was worth approximately $3000, *see id.*, at 716, but the value of the lost tuition in Maine is around $20,000. Pet'r Br., at 23. *Locke* found a "minor burden" in part because Davey could use his "scholarship to pursue a secular degree at a different institution from where [he was] studying devotional theology." *Id.*, at 721 n.4. Maine's students do not have Davey's option of using their public funding at one secular institution

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3 *Locke* left unclear whether challengers of a law that is not facially neutral must establish a substantial burden to succeed on a free exercise claim. Rather, it adduced evidence that suggested the law was not "presumptively unconstitutional" in that case. *See* 540 U.S., at 720-21.

while still receiving a religious education at another. Eligible families must choose to forego a religious education or forego the tuition funding. Indeed, Maine has well exceeded *Locke*'s permission to "cho[ose] not to fund a distinct category of instruction," 540 U.S., at 721; it has refused to fund all education taught from a particular perspective. And, because the tuitioning program is provided in districts *without public schools*, parents and students of faith face the stark decision of either giving up all public support for their educational costs or abandoning their ability to receive that education at a school that happens to reflect their religious faith.

Any other private school will be paid for by the State, just so long as that school does not make the disfavored choice of having some religious aspect. *Locke* simply does not stand for the proposition that any and all exclusions of religious schools from state funding is constitutional. This Court should grant the petition to clarify *Locke*'s scope.

### B. The Eighth and Sixth Circuits Have Found That Categorical Exclusions of Religion from Government Programs Warrant Strict Scrutiny and Violate the Constitution.

#### 1. *Peter v. Wedl* indicates that a categorical exclusion of religious schools from government funding that includes nonreligious private schools is unconstitutional.

Although the Maine Supreme Judicial Court blessed categorical discrimination against religious schools, the Eighth Circuit reached the opposite conclusion on similar facts. In *Peter v. Wedl*, 155 F.3d 992 (CA8 1998), a Minnesota law allowed funding for paraprofessionals to assist disabled children in the classroom so long as those children did not attend religious schools. *Id.*, at 995-96. The law "explicitly discriminated against children who attended private religious schools," *id.*, at 996, for the identical purpose on which the Maine law relied—avoiding a violation of the Establishment Clause. *Id.*, at 997 ("The only compelling interest identified by the State of Minnesota to justify Minnesota Rule 3525.1150 was that the rule was necessary to avoid a violation of the Establishment Clause."). In *Peter*, as in *Anderson*, subsequent decisions by this Court—*Agostini v. Felton*, 521

U.S. 203 (1997), and *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), respectively—clarified that funding the religious schools in each of these cases would likely be permissible under the Establishment Clause. *Peter*, 155 F.3d, at 997 (noting that the Establishment Clause rationale was "highly questionable"); *Anderson*, 895 A.2d, at 955 ("[A]fter *Zelman*, public tuition subsidies to students to attend sectarian educational institutions may be permissible under the Establishment Clause . . . ."). The Eighth Circuit in *Peter* then determined that because the Minnesota rule "cannot be justified as a narrowly tailored means of avoiding a violation of the Establishment Clause, it violated the plaintiffs' rights to free exercise of religion, free speech, and equal protection . . . ." 155 F.3d, at 997.

Although Minnesota eliminated its official exclusion of religious schools from its program of funding paraprofessionals, one school district continued the practice. *See id.* The Eighth Circuit reversed the district court's grant of summary judgment for the school district and remanded the case for a determination of whether religious animus motivated the exclusion. *See id.*, at 998-1002. Significantly, it noted: "If [the school district] denied a paraprofessional . . . because of Minnesota Rule 325.1150's unconstitutional distinction between private religious schools and private nonreligious schools, or otherwise because of the religious nature of [plaintiff's school], then [the school district's] action is illegal and the plaintiffs are entitled to the relief that they seek." *Id.*, at 997. Thus, central to the Eighth Circuit's resolution of the appeal was the conclusion that a categorical exclusion of religion *qua* religion from a funding program was per se hostile to religion and would violate the Free Exercise and Equal Protection Clauses.

The Maine court, by contrast, found that "the fact that . . . the Legislature could hypothetically extend tuition funding to sectarian schools without violating the Establishment Clause does not support a presumption that religious hostility motivates the decision to continue the religious school exclusion." 895 A.2d, at 959. The *Anderson* court then applied rational basis scrutiny to the challenged statute. *Id.* *Peter*, however, began with the proposition that the categorical exclusion targeted religion and applied strict scrutiny. *See Peter*, 155 F.3d, at 996. Then, after the compelling interest in avoiding an Establishment Clause

violation was disproven in light of this Court's more recent pronouncements, *Peter* affirmed that the law violated the First and Fourteenth Amendments. *Id.*, at 997. *Anderson* and *Peter* thus directly conflict as to the level of scrutiny that applies when a State categorically excludes religion from a funding program.

**2. The Sixth Circuit has held that categorically banning religious practices from an army-regulated family child-care provider program failed strict scrutiny analysis.**

The Sixth Circuit addressed an Army regulation's categorical ban on religiously oriented child-care in *Hartmann v. Stone*, 68 F.3d 973 (CA6 1995). There, Army regulations governing the provision of child care on base—at the parents' expense—barred approved providers from engaging in religious exercises with or otherwise proselytizing the children. *Id.*, at 975-77. The Sixth Circuit found initially that "[a] rule that uniformly bans all religious practice is not neutral." *Id.*, at 978 (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) ("[T]he First Amendment forbids an official purpose to disapprove of a particular religion, *or of religion in general.*") (emphasis added)). Because the Sixth Circuit found that the categorical exclusion of religion deprived the law of neutrality, it applied strict scrutiny using the standard articulated in *Lukumi*: "[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral . . . and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest." *Id.*, at 979 (quoting *Lukumi*, 508 U.S. at 533). Indeed, the *Hartmann* court found that if the law was not neutral, the plaintiffs need not demonstrate a substantial burden on their religious exercise—the categorical religious exclusion itself sufficed to trigger strict scrutiny. *Id.*, at 979 n.4. The court concluded that the army's program violated the First Amendment. *Id.*, at 986. Thus, *Hartmann* also conflicts with *Anderson* both in finding that a categorical ban on religious exercises warrants strict scrutiny and in not requiring the plaintiffs to demonstrate a substantial burden for that test to apply.

## II. THE CONSTITUTION MANDATES NEUTRALITY TOWARD RELIGION THROUGH THE ESTABLISHMENT CLAUSE, THE FREE EXERCISE CLAUSE, THE EQUAL PROTECTION CLAUSE, AND THE FREE SPEECH CLAUSE.

Maine's categorical exclusion of religious schools from an otherwise neutral, generally applicable funding program unconstitutionally discriminates against religion. Regardless of the clausal lens through which the program is viewed, this discrimination violates the bedrock principle underlying the Establishment Clause, the Free Exercise Clause, and the Equal Protection Clause.[4] That principle—neutrality—demands at minimum that a State not place religious persons or institutions at a substantial disadvantage by excluding them from state-sponsored benefits to which they are otherwise entitled.

Neutrality has long been a fixed and constant star in the Court's jurisprudence addressing religious discrimination under the Establishment Clause, the Free Exercise Clause, the Equal Protection Clause, and the Free Speech Clause.[5] These clauses—and the neutrality

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4 In Maine, "the rights guaranteed by the United States Constitution and the Maine Constitution are coextensive." *Anderson v. Town of Durham*, 895 A.2d 944, 949 n.4 (Me. 2006) (quoting *Bagley v. Raymond Sch. Dep't*, 728 A.2d 127, 132 (Me. 1999)).

5 The Free Speech Clause's prohibition on viewpoint neutrality reinforces and converges with the Free Exercise Clause, the Establishment Clause, and the Equal Protection Clause. This Court has repeatedly held that the Free Speech Clause forbids the exclusion of speakers or groups from a public forum or limited public forum because of their religious message. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 120 (2001) (holding that public school's exclusion of Christian Bible Club from after-school community-use program based on club's religious nature constituted impermissible viewpoint discrimination); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 842-46 (1995) (holding that state university's refusal to fund student group's newspaper expressing Christian editorial viewpoint was viewpoint discrimination, and that funding newspaper as part of general, religion-neutral program funding various student groups did not violate the Establishment Clause); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 390-96 (1993) (holding that exclusion of Christian-oriented film series from program allowing various groups to use school premises after hours constituted viewpoint discrimination,

principle uniting them—converge in this case to demonstrate that Maine has impermissibly discriminated against parents' religiously motivated educational choices. Although this Court held in *Locke v. Davey*, *supra*, that the State of Washington could refuse to fund theology majors, Maine's program goes considerably further. *See supra* Part I.A. The Court found significant in *Locke* that the State allowed the neutrally awarded scholarship funds to facilitate both the study of religion from a secular perspective and the study of secular subjects from a religious perspective. *See* 540 U.S., at 724-25. Maine's parents, however, may not use state tuition for education from *any* religious high school. *See* 20-A M.R.S. §2951(2).[6] The Maine statute does not comport with the Constitution.

### A. The Religion Clauses Jointly and Severally Compel Neutrality.

This Court has most directly recognized the principle of governmental neutrality toward religion in the First Amendment's Free Exercise and Establishment Clauses. U.S. CONST. amend. I ("Congress

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and rejecting argument that allowing films would violate Establishment Clause); *Widmar v. Vincent*, 454 U.S. 263, 267 (1981) (holding that state university could not deny student prayer and Bible-study group access to university facilities available to other student groups); *see also Bd. of Regents of Wis. v. Southworth*, 529 U.S. 217, 231 (2000) ("It infringes on the speech and beliefs of the individual to be required, by this mandatory student activity fee program, to pay subsidies for the objectionable speech of others without any recognition of the State's corresponding duty to him or her."). This Court held in *Locke v. Davey* that the speech-forum line of cases was "inapplicable" to Washington's Promise Scholarship Program. 540 U.S. 712, 720 n.3 (2004). However, the same bedrock principle on which the forum cases' doctrine of viewpoint neutrality rests also informs the doctrines governing the interpretation of the Establishment Clause, the Free Exercise Clause, and the Equal Protection Clause.

6 The statute states that schools receiving "public funds for tuition purposes" must be "nonsectarian." 20-A M.R.S. §2951(2). Although the Maine Court noted that the schools petitioners attend are "pervasively sectarian," *Anderson*, 895 A.2d, at 950 & n.7 (citing *Hunt v. McNair*, 413 U.S. 734, 743 (1973)), the parties in this case have not suggested that Maine's law would allow funds to sponsor tuition at a nominally religious high school. Functionally, "nonsectarian" operates as a categorical exclusion of all religious high schools.

shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . . ."). These clauses jointly ensure religious liberty by mandating that the government can neither "impose special disabilities on the basis of religious views or status," *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 877 (1990), nor foster "bias or hostility to religion," *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 846 (1995). As one First Amendment scholar has explained, although some perceive tension between the Free Exercise and Establishment Clauses, the two clauses are more appropriately viewed as "but two sides of the same coin" representing "a single value in our constitutional democracy—religious freedom." Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 313 (1986); *see also Larson v. Valente*, 456 U.S. 228, 245 (1982) ("Th[e] constitutional prohibition of denominational preferences is inextricably connected with the continuing vitality of the Free Exercise Clause. . . . Free exercise thus can be guaranteed only when legislators—and voters—are required to accord to their own religions the very same treatment given to small, new, or unpopular denominations."). Thus, a "proper respect for both the Free Exercise and the Establishment Clause compels the State to pursue a course of neutrality toward religion." *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 792-93 (1973).

**1. The Free Exercise Clause prevents unjustified hostility toward religion.**

"The Free Exercise Clause protects religious observers against unequal treatment." *Lukumi*, 508 U.S., at 542 (citation omitted). Laws burdening religious practices must be neutral and of general applicability; otherwise, they must be narrowly tailored to advance "interests of the highest order," a "most rigorous" form of scrutiny that is satisfied "only in rare cases." *Id.*, at 546. The minimum requirement of neutrality is that the law must not be facially discriminatory. *Id.*, at 533. Moreover,

"categories of selection are of paramount concern when a law has the incidental effect of burdening a religious practice." *Id.*, at 542.[7]

In *Lukumi*, the Court unanimously struck down on Free Exercise grounds a group of municipal ordinances that sought to prevent the sacrifice of animals by practicioners of the Santeria religion. After examining those ordinances, the Court concluded that "religious practice [was] being singled out for discriminatory treatment." *Id.*, at 538.

The Court rejected the City of Hialeah's argument that the ordinances were validly aimed at preventing animal cruelty and avoiding health hazards from improper disposal because the City had not attempted to pursue these goals with regard to conduct not motivated by religious belief. *Id.*, at 544-45. Because the ordinances distinguished between identical conduct based solely on religious belief—prohibiting animal slaughter by religious believers but allowing it by secular operators—the Court concluded that they constituted a "religious gerrymander" and struck them down as an impermissible burden on Santeria practicioners' free exercise rights. *Id.*, at 535-38.

The distinctions between this case and *Lukumi* do not remove Maine's law from *Lukumi*'s ambit: (1) In *Lukumi*, the law in question targeted one particular religion—Santeria—while Maine's law targets religion generally; and (2) *Lukumi* made a specific religious exercise illegal while Maine has merely excluded religious institutions from an educational funding scheme, leaving believers to worship or practice as they wish. The key issue is the same: Both laws discriminated against otherwise permissible conduct based on its religious perspective. The City of Hialeah allowed animal slaughter so long as it was not religious; likewise, Maine funds high school instruction so long as it is not

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7 The *Locke* Court noted that "[b]ecause . . . the program is not a violation of the Free Exercise Clause, . . . we apply rational-basis scrutiny to his claims. . . . [T]he program passes such review." 540 U.S., at 721 n.3. The *Locke* opinion thus recognizes the link between the Free Exercise Clause and the Equal Protection Clause. A law that infringes on a fundamental right, such as the right to the free exercise of one's religion, would warrant strict scrutiny. The Equal Protection Clause thus reinforces the neutrality guarantee of the Free Exercise Clause by holding laws that infringe upon it to a higher standard.

religious. Indeed, as the *Lukumi* Court said, "At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons."[8] *Id.*, at 532; *see also McDaniel v. Paty,* 435 U.S. 618, 620, 629 (1978) (plurality op.); *id.*, at 630-31 (Brennan, J., concurring) (invalidating on Free Exercise grounds a Tennessee law discriminating against religion generally by banning ministers or priests "of any denomination whatever" from serving as delegates to state constitutional conventions); *Fraternal Order of Police v. City of Newark*, 170 F.3d 359 (CA3 1999) (applying strict scrutiny and invalidating on Free Exercise grounds an exemption to a policy requiring police officers to shave that was granted for medical reasons but denied for religious reasons).

*Lukumi* teaches that the Free Exercise Clause prohibits singling out religious belief or affiliation as the basis for providing different treatment to persons who are otherwise similarly situated. Critical to the constitutional infirmity of the Maine program is the *general applicability* of the tuitioning statute. Maine has decided that every student in a district without a public school deserves a state-sponsored education--except those students who choose to attend religious schools. The State of Maine could have required the establishment of a public school, or decided to subsidize one specific type of speech or area of academic study, but it has not. Once the State creates a generally applicable tuition payment program, it may not discriminate against certain of its citizens solely because they choose to pursue a religious education any more than it could redraw bus routes to avoid religious schools or deny students library cards who would use the books to write devotional essays.

It is no answer to say that because the State could have established a public school that would exclude sectarian beliefs from its curriculum, it may also exclude sectarian schools from its tuition funding program.

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8 Even though "[n]one of the parties asserts that their [*sic*] religious beliefs mandate that they send their children to religious schools," *Anderson*, 895 A.2d, at 950, some parents asserted that they sent their children to religious schools for religious reasons. *See id.*

Certainly Maine is not constitutionally required to establish a public school or to fund any private schools, but once it chooses to provide private school tuition funding in lieu of a public education, it creates a "baseline against which the burdens on religion are measured; and when the State withholds that benefit from some individuals solely on the basis of religion, it violates the Free Exercise Clause no less than if it had imposed a special tax." *Locke*, 540 U.S., at 726-27 (Scalia, J., dissenting).[9]

This principle is the obverse of the Court's holding in *Smith*, that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." 494 U.S., at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in the judgment)). Just as the Free Exercise Clause does not give license for religious believers to disregard neutral and generally applicable laws, neither does it permit government to exclude religious believers from otherwise generally applicable programs.

Here, Maine's tuition payment statute is not even facially neutral. The statute states that "[a] private school may be approved for the receipt of public funds only if it: . . . [i]s a nonsectarian school in accordance with the First Amendment of the United States Constitution : . . ." 20-A M.R.S. §2951(2). Thus, the statute "impos[es] special disabilities on the basis of religious views or status," *Smith*, 494 U.S., at 877, and is not entitled to *Smith*'s rational-basis deference. "Neutrality and general applicability are interrelated . . . . A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Lukumi*, 508 U.S., at 531-32.

Indeed, Maine's Supreme Judicial Court recognized pre-*Locke* that the statute should be subjected to strict scrutiny. *Anderson*, 895 A.2d, at 959. Although *Locke* refused to apply strict scrutiny to fund the training

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9 The categorical exclusion of religious schools from the full tuition funding provided for other private schools does not qualify for *Locke*'s narrow exception. *See supra* Part I.A.

of ministers, that case does not stand, as the Maine court suggests, for the proposition "that a statute does not lose its neutrality and become subject to strict scrutiny simply because it precludes the state funding of a religious educational choice." *Anderson*, 895 A.2d, at 959; *see supra* I.A. Rather, *Locke* specifically declined to address the sort of broad-based categorical exclusion of religion Maine has adopted, finding merely that Washington's program was not "presumptively unconstitutional." *Locke*, 540 U.S., at 720.

Maine's statute requires parents and students to abandon either the religious education they desire or the tuition funding Maine would provide if they attended a secular private school. *Cf. McDaniel*, 435 U.S., at 629 (holding a law unconstitutional that required a minister to abandon either his calling or his elected office). Because the Free Exercise Clause prohibits discrimination against religious belief regardless of whether such discrimination constitutes a direct or indirect burden on religious practice, the tuitioning statute is constitutionally invalid.

**2. The Establishment Clause commands official neutrality toward religion.**

The Establishment Clause both prevents official sponsorship of religion and prevents official discrimination against it. Indeed, the second prong of the classic tripartite test articulated in *Lemon v. Kurtzman* for evaluating Establishment Clause claims requires that a law's "principal or primary effect must be one that neither advances *nor inhibits* religion." 403 U.S. 602, 612 (1971) (emphasis added). If creating an incentive that favors religion would improperly "advance" religion, creating a disincentive would likewise unconstitutionally "inhibit" it. *See Zelman*, 536 U.S., at 648-49 (noting that the Establishment Clause prevents states "from enacting laws that have the 'purpose' or 'effect' of advancing or inhibiting religion") (citation omitted).

The Maine Supreme Judicial Court agreed that the Establishment Clause could permit the State to pay for students' tuition at religious schools. *See Anderson*, 895 A.2d, at 959 (noting that "the Legislature could hypothetically extend tuition funding to sectarian schools without

violating the Establishment Clause"). Maine's tuitioning statute is similar to that approved in *Zelman* in all legally relevant aspects. Opening Br. of Plaintiffs-Appellants, at 11. So long as a government program is neutral—between and among different religions, and between religion and nonreligion—the fact that, through the exercise of individual choice on the part of the recipient, government money ultimately goes to religious ends does not render the government program invalid.

The Court's Establishment Clause jurisprudence reflects a requirement of neutrality toward religion that exists in harmony with the neutrality commanded by the Free Exercise Clause. And a long line of this Court's cases make clear that neutrality both satisfies and is required by the Establishment Clause. *See Zelman,* 536 U.S., at 653-54 (holding that the state's school-voucher program did not violate the Establishment Clause because it was "neutral in all respects toward religion," accomplished a secular purpose of providing educational assistance to a broad class of persons without regard to religion, and contained no financial incentives favoring religious schools over non-religious ones); *Mitchell v. Helms*, 530 U.S. 793, 808-11 (2000) (plurality op.) (upholding State's load of non-religious educational materials to religious schools because aid had valid secular purpose and was offered on religion-neutral basis to all schools); *Agostini*, 521 U.S., at 234-35 (holding that provision of remedial instruction by government employees at sectarian schools did not violate Establishment Clause when provided to disadvantaged children on neutral basis pursuant to program containing safeguards preventing state-sponsored religious indoctrination).

Indeed, "the Establishment Clause forbids the government to use religion as a line-drawing criteria. In this respect, the Establishment Clause mirrors the Equal Protection Clause. Just as the government may not segregate people on account of their race, so too it may segregate on the basis of religion. The danger of stigma and stirred animosities is no less acute for religious line-drawing than for racial." *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet,* 512 U.S. 687, 728 (1994) (Kennedy, J., concurring).

Line-drawing is essentially coercive, and the principle of coercion also links the Establishment Clause and the Free Exercise Clause. The Establishment Clause prevents the intentional coercion of nonadherents

into a public religious exercise. *See Lee v. Weisman,* 505 U.S. 577 (1992) (holding a graduation prayer unconstitutional). Likewise, the Free Exercise Clause prohibits the targeted coercion of adherents into not practicing the tenets of their faith, *see Lukumi,* 508 U.S., at 533, or the coercive choice between a religious calling and a government benefit. *See McDaniel,* 435 U.S., at 629. Maine's tuitioning statute is particularly coercive in that it deprives parents of an entire category of educational choices unless they can afford to pay for it themselves. Indeed, for precisely this reason, John Bapst Catholic High School was forced to close when Maine excluded religious schools from tuition funding. *See* Pet'r Br., at 5.

Once the government makes available a public benefit, categorically excluding religion from that benefit is unconstitutional under either Establishment or Free Exercise analysis.

### B. The Equal Protection Clause Protects Religion from Categorical Exclusion.

The neutrality required under the Free Exercise and Establishment Clauses is closely related to the neutrality principles undergirding the Equal Protection Clause. "At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, *religious,* sexual, or national class." *Miller v. Johnson,* 515 U.S. 900, 911 (1995) (emphasis added) (quoting *Metro Broad., Inc. v. FCC,* 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting), and *Ariz. Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris,* 463 U.S. 1073, 1083 (1983)).

The anti-discrimination principle enshrined in the Religion Clauses is consonant with the Court's recognition that classifications based on religion warrant strict scrutiny because the Equal Protection Clause forbids discrimination on the basis of a person's religious belief. *See Smith,* 494 U.S., at 886 n.3; *Burlington N. R.R. Co. v. Ford,* 504 U.S. 648, 651 (1992); *City of New Orleans v. Dukes,* 427 U.S. 297, 303 (1976) (per curiam).

This Court also has long recognized that equal protection principles apply at the convergence of free-speech and free-exercise rights. *See*

*Niemotko v. Maryland*, 340 U.S. 268, 272 (1951) ("The right to equal protection of the laws, in the exercise of those freedoms of speech and religion protected by the First and Fourteenth Amendments, has a firmer foundation than the whims or personal opinions of a local governing body."); *id.*, at 284 (Frankfurter, J., concurring in the result) ("To allow expression of religious views by some and deny the same privilege to others merely because they are unpopular, even deeply so, is a denial of equal protection of the law forbidden by the Fourteenth Amendment."). For example, in *Police Department of Chicago v. Mosley*, the Court struck down a statute exempting peaceful labor picketing from a general prohibition on picketing next to a school, concluding that the need for content neutrality in a state's "time, place, and manner" regulations of speech involved an equal protection claim closely intertwined with First Amendment interests: "[G]overnment may not grant the use of a forum to people whose views it finds acceptable, but deny its use to those wishing to express less favored or more controversial views . . . There is an 'equality of status in the field of ideas.'" 408 U.S. 92, 95-96 (1972).

The Equal Protection Clause's principle of neutrality toward religion also undergirds the forum cases decided in the Free Speech context. Indeed, this Court has repeatedly held that the Free Speech Clause forbids the exclusion of speakers or groups from a public forum or limited public forum because of their religious messages. *See supra* n.4. The forum cases, in turn reflect the neutrality principle underlying and emanating from the Equal Protection and Free Exercise inquiries.

The Free Speech Clause does not allow a State distributing a generally available benefit to engage in viewpoint discrimination. That clause requires "the most exacting scrutiny in cases in which a State undertakes to regulate speech on the basis of its content." *Widmar v. Vincent*, 454 U.S. 263, 277 (1981). This scrutiny applied to restrictions on religious speech tracks that applied to other types of religious discrimination. This Court has recognized that complying with the Establishment Clause may be a compelling interest to satisfy that scrutiny. *Id.*, at 271. It held in *Rosenberger*, however, that if funding of religious speech would not violate the Establishment Clause, fear of such violation would not excuse unconstitutional viewpoint discrimination. 515 U.S., at 845-46.

That commitment to neutrality informs the Free Exercise and Equal Protection analysis here. The Maine Supreme Judicial Court rightly observed (then wrongly applied) the rule that if the Establishment Clause did not require the exclusion of religious schools, then §2951(2) "must be struck down because the State offers no other reason for its existence." *Bagley v. Raymond Sch. Dep't*, 728 A.2d 127, 138 (Me. 1999). Once the Establishment Clause bar is removed, the categorical exclusion of religious schools under a facially discriminatory law cannot survive strict scrutiny under either the Free Exercise or Equal Protection analyses. Indeed, this Court has gone even further, indicating that a broad categorical exclusion of a particular group from rights other citizens enjoyed "seems inexplicable by anything but animus toward the class that it affects; it lacks a rational relationship to legitimate state interests." *Romer v. Evans*, 517 U.S. 620, 632 (1996).

It is therefore unsurprising that the Court has looked repeatedly to its equal protection jurisprudence in assessing neutrality for purposes of both Free Exercise and Establishment Clause analysis. *See Lukumi*, 508 U.S., at 540 (applying equal protection principles to Free Exercise analysis) (citing *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 696 (1970) (opining that the Establishment Clause "*requires an equal protection mode of analysis*. The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders.") (Harlan, J., concurring) (emphasis added)); *see also Lukumi*, 508 U.S., at 578 (Blackmun, J., concurring) (describing the *Smith* Court as "treat[ing] the Free Exercise Clause as no more than an antidiscrimination principle").[10] Accordingly, the Equal Protection

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10 First Amendment scholars have applauded the equal-protection aspect of the Court's treatment of the Religion Clauses. *See, e.g.*, Eugene Volokh, *Equal Treatment Is Not Establishment*, 13 NOTRE DAME J.L., ETHICS & PUB. POL'Y 341, 365-72 (1999); Paulsen, *supra*, at 325 ("[T]he establishment clause is best understood as providing for the equal protection of the free exercise of religion."). That equal protection component can be recognized for its independent force or characterized as an aspect of incorporation, focusing like a lens the contours of the Religion Clauses. *See Recent Development: Animal Sacrifice and Equal Protection Free Exercise*, 17 HARV. J. L. & PUB. POL'Y 262 (1994); *cf.* Akhil Amar, *The Bill of Rights as a Constitution*, 100 YALE L. J. 1131,

Clause serves as yet another source of the neutrality principle that forbids governmental discrimination against religious belief.

As this Court has stated, the "guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse." *Rosenberger*, 515 U.S., at 839. Requiring Maine to cease excluding religious schools from its tuitioning funding program will promote that diversity, respect the constitutional norm of neutrality, and prevent unconstitutional discrimination on the basis of religion.

## III. SHOULD THE COURT WISH TO DECIDE THIS IMPORTANT QUESTION, THE INSTANT CASE WOULD PROVIDE AN APPROPRIATE VEHICLE TO STRIKE A CATEGORICAL EXCLUSION OF RELIGION.

In *Locke*'s wake, there is a substantial need for the Court to clarify the standard of scrutiny applicable to a categorical exclusion of religion from a government benefit and whether such exclusion indicates hostility toward religion. This case would be a suitable vehicle for that purpose. First, the facts are not in dispute. *Anderson*, 895 A.2d, at 949. Second, the First and Fourteenth Amendment rights under the federal Constitution are coextensive with the parallel rights under Maine's constitution. *Id.*, at 949 n.4. Finally, Maine has no Blaine Amendment and no historical tradition of refusing to fund religious schools that would distinguish its laws from the Court's interpretation of the federal Constitution. Thus, the issue of whether a categorical exclusion of religion from a generally available public benefit is squarely presented.

## CONCLUSION

For the foregoing reasons, the Court should grant the petition for writ of certiorari and reverse the judgment of the Maine Supreme Judicial Court.

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1136-37 & n.23 (1991).

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